FILED
United States Court of Appeals
Tenth Circuit

September 11, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: DAVID A. ABSTON,

Movant.

No. 12-5143
(D.C. Nos. 4:09-CV-00643-JHP-PJC &
4:06-CR-00199-JHP-1)
(N.D. Okla.)

ORDER

Before **KELLY**, **TYMKOVICH**, and **GORSUCH**, Circuit Judges.

David A. Abston, a federal prisoner appearing pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his conviction. Before a federal prisoner may file a second or successive motion under § 2255, he must first obtain an order from the court of appeals authorizing the district court to consider the motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). We deny authorization.

Mr. Abston pleaded guilty to one count of distribution of child pornography and one count of possession of child pornography. He was sentenced to 240 months' imprisonment on the distribution count and 120 months' imprisonment on the possession count. The sentences ran consecutively, for a total of 360 months. He appealed, but we granted the government's motion to enforce an appeal waiver in his plea agreement and dismissed his appeal. *United States v. Abston*, 304 F. App'x 701, 707 (10th Cir. 2008). Mr. Abston then filed a § 2255 motion, which the district court

denied. Mr. Abston sought to appeal that decision, but we denied him a certificate of appealability. *See United States v. Abston*, 401 F. App'x 357, 367 (10th Cir. 2010).

In his motion for authorization, Mr. Abston presents two claims for our consideration. To obtain authorization to file a second or successive § 2255 motion in the district court, a federal prisoner must demonstrate that his proposed claims either depend on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense," § 2255(h)(1), or rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," § 2255(h)(2).

Mr. Abston first contends that he received ineffective assistance of counsel when his trial counsel failed to present to him a plea agreement under which Mr. Abston would plead guilty to one count of distribution of child pornography and face a statutory maximum term of imprisonment of twenty years. He claims he would have accepted that plea agreement if he had known about it, rather than the later plea agreement under which he was sentenced to thirty years. To garner our authorization on this claim, he asserts that the Supreme Court's decision in *Missouri v. Frye*, 132 S. Ct. 1399 (2012), amounts to a new rule of constitutional law satisfying the requirements of § 2255(h)(2). We disagree.

In *Frye*, the Supreme Court held "that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.* at 1408. The Court also explained that, where a plea offer lapses or is rejected because of counsel's deficient performance, defendant must establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), by showing a reasonable probability that he would have accepted the plea, that the prosecution and trial court would have accepted it, and that "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 132 S. Ct. at 1409; *see also id.* at 1410 (stating that "*Strickland*'s inquiry into whether the result of the proceeding would have been different requires looking . . . at . . . whether [defendant] would have accepted the offer to plead pursuant to the terms earlier proposed" (citation and internal quotation marks omitted)).

We note that the Seventh and Eleventh Circuits have held that *Frye* did not announce a new rule of constitutional law. *See Hare v. United States*, __ F.3d __, 2012 WL 3156329, at *1-*3 (7th Cir. Aug. 6, 2012); *In re Perez*, 682 F.3d 930, 932-33 (11th Cir. 2012). We need not reach that broader question, however, because "a new rule is not made *retroactive to cases on collateral review* unless the Supreme Court holds it to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (emphasis added; internal quotation marks omitted); *see also Bey v. United States*, 399 F.3d 1266, 1268 (10th Cir. 2005) ("[A] new rule is made retroactive to cases on collateral

review only when the Supreme Court *explicitly holds* that the rule it announced applies retroactively to such cases."). The Supreme Court has not so held as to *Frye*.

Mr. Abston's proposed second claim is that he is actually innocent of distributing child pornography. But he relies on no newly discovered evidence, and he has not identified a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. Accordingly, as to this claim, he has failed to satisfy either of the conditions set out in § 2255(h).

Because Mr. Abston's proposed claims do not satisfy the requirements of § 2255(h), we DENY his motion for authorization. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk